No. 11399

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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APPELLEE'S BRIEF.

Jurisdiction.

The jurisdictional phase of the within appeal has been stated by Appellant with substantial correctness and, for that reason, Appellee makes no further statement in that regard.

Statement of the Case.

Appellant's appeal is from a judgment on a verdict of $3,000 general damages, $23 special damages and $63.60 costs in favor of Appellee and against Appellant [pp. 26-28]. (All page references herein are to the printed Transcript of Record.) The actual medical expenses of the Appellee, however, were $45 for Dr. Ghrist, $24 for

the hospital, $20 for the anesthetist and $2 for medicines, or a total of $91.00 [pp. 54, 105-107].

The facts out of which the case arose are as follows: Prior to October 13, 1945, Appellee, when alone with his wife at home, would take off the hearing aid worn by him, and his wife could make him hear her by shouting and talking loud. She could be in the same room with him or just step into the next room and talk in a loud voice, and Appellee would hear her [p. 43].

In the course of Appellee's purchase, on October 13, 1945, of a new Zenith hearing aid from Appellant [pp. 32, 35-38], an employee of Appellant left in Appellee's left ear, in the inner third of the ear canal, a white, hard mass identified by Dr. Ghrist as a "plaster of Paris" like substance [p. 84]. It felt like a "stone wall" to Appellee [p. 46] but he endured the pain from Saturday, October 13, 1945, until Monday, October 15, 1945 [pp. 44-47]. On October 15, Dr. Ghrist tried for over one-half hour to remove the substance in his office but could not get a grasp on it [pp. 47, 85]. After further "digging" by the doctor, until Appellee "broke down" from the pain [p. 48], Appellee was sent home. He went to the Physicians and Surgeons Hospital in Glendale on October 16, 1945 [pp. 48, 86]. Appellee suffered "exquisite pain" [p. 85] prior to the removal of the substance from his ear. This removal was under an anesthetic and took about 45 minutes [p. 86]. Although there was no hole in the eardrum, there was a severe inflamation and the mem-

branes began to "swell" after the removal of the substance [p. 87].

On October 19, 1945, Dr. Ghrist saw Appellee, who was dizzy and sick and the doctor gave sulfadiazene, the eardrum being quite red and swollen and the inner third of the ear canal being "extremely swollen" [pp. 87-88]. Dr. Ghrist saw Appellee again on October 22nd, October 29th, November 2nd, and November 9th, 1945 [p. 88]. While the reddened, inflamed condition lasted, said condition was accompanied by severe pain [p. 89]. After his last visit to Dr. Ghrist, Appellee continued to have an annoying feeling over the left ear "like a fly" bothering him all the time. This lasted until within five to six weeks of the date of the trial, to-wit, May 8, 1946 [pp. 31, 55]. It was the opinion of Dr. Ghrist that there could be a relationship between this sensation and the ear condition treated by him [pp. 101-102]. Appellee's wife observed the discomfort suffered by Appellee from the drainage from his ear following his return from the hospital and the miserable headaches that required Appellee to keep taking aspirins [pp. 111-112]. She also noticed "a big difference" in Appellee's hearing after the injury to his ear and more particularly his inability to hear her in the same room [pp. 112-113]. Appellee's nervous condition and the profound effect of his experience were evidenced at the trial by the shedding of tears, Appellant's counsel examining Appellee in an effort to cast doubt on the sincerity of Appellee's actions in this regard [p. 104].

Questions at Issue.

The questions involved on this appeal are four:

1. Was it error for the Trial Court to instruct the jury that it could consider, as an "element" of damage, the "phsical pain, if any, which he (Appellee) has suffered * * *, or which he is reasonably certain to suffer in the future" in view of the further instruction informing the jury that they were *not* permitted "to award * * * speculative damages" *i. e.,* "compensation for prospective detriment which, although possible, is remote, conjectural or speculative" [p. 203]. (Italics ours.)

2. Was not the instruction re damages, as given, *less* favorable to Appellee than the provisions of Civil Code Section 3283 warranted?

3. Is not Appellee entitled to the benefits of the presumption that the jury in assessing damages, was actuated by pure motives and followed the instructions of the Trial Court?

4. Was not the verdict amply supported by the evidence as to damages?

ARGUMENT.

I.

The District Court Did Not Err in Its Instruction re General Damages.

A. The Law Is Well Settled That If a Jury Is Not Misled by an Instruction, No Error Can Be Predicated Upon the Giving of Such Instruction.

In this case the Trial Court, after paraphrasing the provisions of Section 3283 of the California Civil Code, further instructed the jury that it was not permitted to award the plaintiff speculative damages "by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative." If the general instruction had been misleading (and we submit it had not for reasons hereafter stated), this further instruction definitely forestalled speculation and conjecture on behalf of the jury.

Dougherty v. Ellingson, 97 Cal. App. 87, 96.

It would not be proper for the reviewing Court to take one isolated instruction and consider it alone, separate and apart from the other instructions given. Instructions must be considered in their entirety and if, when so considered, they state the law of a case fairly and clearly, then they are, as a whole, unobjectionable even though some isolated passages from a single instruction are amenable to criticism.

Los Angeles County Flood Control District v. Abbot, 24 Cal. App. (2d) 728, 739, 740.

B. The Cases, Cited by Appellant as Controlling, Are Distinguishable From the Case at Bar.

The decision in the case of *Silvester v. Scanlan,* 136 Cal. App. 107, is based, in part, on the determination by the Court that it was "not claimed that plaintiff suffered any substantial physical injuries," that the instruction referred to the reasonable expectation of future "mental worry," and that there was no evidence of probable future consequences. In the present case (1) it *was claimed* and proven that plaintiff did suffer substantial physical injuries, to-wit, "exquisite pain" from an inflamed and swollen ear canal and drum, and (2) the instruction given, while not referring to "mental worry" (a "detriment" contemplated by Civil Code, Section 3283), does encompass probable future consequences, namely, those in this brief hereafter specified.

The case of *Bellman v. San Francisco High School District,* 11 Cal. (2d) 576, cites the *Silvester* case merely for the proposition that no compensation may be awarded for future damages unless they are reasonably certain to occur. It *does not* support the rigid rule that Appellant would attempt to impose upon the giving of "damage instructions."

The same observation and objection can be, and is hereby, made to the use by Appellant of the *Caminetti* case (*Caminetti v. Pacific Mutual Life Ins. Co.,* 23 Cal. (2d) 94), where the *Bellman* case (not the *Silvester* case) is approved on the general subject of future damages *and not on any question of purported error in instructions.*

C. There Was Evidence From Which the Jury Was Entitled to Find That Appellee Was "Reasonably Certain" to Suffer Pain in the Future.

Appellant in its opening brief has adequately covered the treatment of Appellee by Dr. Ghrist, Appellee's attending physician, *with the important exception* that Appellant fails to refer to the extreme difficulties which the doctor experienced trying to remove the "plaster of Paris" like substance from Appellee's left ear [pp. 47-48, 85-86]. Appellant also omits to mention the suffering by Appellee of "exquisite pain" [p. 85] prior to the removal of the substance from his ear. The removal was done under an anesthetic and took about forty-five minutes, and upon such removal Dr. Ghrist discovered that, although there was no hole in the eardrum, there was a severe amount of inflamation and the membranes of the ear began to swell after the removal of the substance [pp. 86-87]. Thereafter, on October 19, 1945, six (6) days after the injury to Appellee, he was dizzy and sick, and was given sulfadiazene for the infection in his ear [pp. 87-88]. While it is true that the appearance of the ear was sufficiently good on November 9, 1945, to result in the discharge of the Appellee by Dr. Ghrist, Appellee continued to have an annoying feeling over the left ear "like a fly" bothering him all the time, which feeling was last noticed by Appellee within five or six weeks of May 8, 1946, the date of the trial [pp. 31, 55]. Appellee's wife observed the discomfort suf-

fered by the Appellee from the drainage from his ear during the period of treatments by Dr. Ghrist, and the miserable headaches therefrom which required the taking of aspirins [pp. 111-112]. Appellee's wife also noticed "a big difference" in Appellee's hearing after the injury to his ear [pp. 112-113]. Appellee's nervous condition and the profound effect of his experience were evidenced at the trial and were quite apparent to the Court and jury; in fact, so much so, that Appellant's counsel examined Appellee in an effort to cast doubt in the jury's mind as to the sincerity of Appellee's crying on the stand [p. 104].

As hereinafter in this brief pointed out, the provisions of Section 3283 of the Civil Code do not limit the consideration of damages to mere "pain" as such, but extend such consideration to the "detriment" which is reasonably certain to occur in the future. From the facts above related, it is obvious that the jury was not only entitled to consider future headaches which might be reasonably certain to result from the aforementioned injury, but also the reasonable certainty of "future detriment" such as the continuance of the nervous condition referred to and demonstrated by Appellee, and the acceleration of Appellee's continued loss of hearing.

II.

The Instruction re Damages as Given by the Trial Court, Was Less Favorable to Appellee Than the Provisions of Civil Code Section 3283 Warranted.

Section 3283 of the California Civil Code provides "Damages may be awarded * * * for *detriment* * * * certain to result in the future." (Italics ours.) In *Lang v. Barry,* 71 Cal. App. (2d) 121, the rule is stated that the "detriment" for which damages can be awarded "is not limited to impairment of earning capacity or pain." Thus we see that the Trial Court in this case gave to the jury a more restrictive instruction than would have been justified by the aforementioned Code section.

It has frequently been held that a "nervous condition" is properly an element of damages to be submitted to the jury. (*Johnson v. Pearson*, 100 Cal. App. 503, 506, 508.)

III.

Appellee Is Entitled to the Benefits of the Presumption That the Trial Jury Was Actuated by Pure Motives in Reaching Its Verdict and That It Followed the Instructions of the Trial Court.

From a very early date, the California Courts have favored the presumption that a jury, in rendering its verdict, was actuated by the purest motives. (*Scally v. W. T. Garratt & Co.,* 11 Cal. App. 138, 146, 147.) The jury is treated as a favorite and almost sacred tribunal in valuing the injury and in awarding compensation therefor. (*Eldridge v. Clock & Henery Const. Co.*, 75 Cal. App. 516, 536.) Where the instructions admonish the jury to award only such damages as plaintiff proves he has sustained, it cannot be assumed (*Anderson v. Freis,*

61 Cal. App. (2d) 159, 166) that the jury will include in its award "any sums for elements of damage which plaintiff has not proved that he * * * sustained." It has been pointed out by our Appellate Courts that, by reason of the very uncertainties of the situation, the segregation of the elements combining to form the full measure of damages and the assessing of damages therefrom call for a "wide latitude" and an "elastic discretion" in the jury's deliberations. (*Taylor v. Pole,* 16 Cal. (2d) 668, 672, 673.)

IV.

The Verdict Was and Is Amply Supported by the Evidence as to Damages.

A. There Was Evidence as to Future Detriment, Including Pain.

We have previously demonstrated under Point I, that there was and is considerable evidence as to future detriment to Appellee, including "pain."

However, in considering the verdict of the jury to determine the alleged existence of "passion and prejudice," the Appellate Court should give substantial consideration to the detriment suffered by Appellee *prior to the trial of the case.*

B. The Evidence Shows That the Injury and Pain Suffered by Appellee Prior to the Trial Were Substantial.

As pointed out by Appellant, Appellee prior to October 13, 1945, had been suffering a gradual loss of hearing over a period of years [pp. 59-60]. However, prior to the injury in question, Appellee had been able to remove his hearing aid at home and still hear his wife when she talked in a loud voice in the next room [p. 43]. After

the injury Appellee's wife noticed a "big difference" in his ability to hear her [pp. 112-113]. Appellee endured the pain, described by his doctor as "exquisite" [p. 85], over the weekend following the 13th of October [pp. 44-47]. The doctor was unable to remove the plaster-like substance in his office after much "digging" and Appellee "broke down" from the pain [pp. 47-48, 85]. The operation on October 16, 1945, was under an anesthetic and took 45 minutes [p. 86]. The eardrum and ear canal were inflamed and swollen and this condition lasted several days and was accompanied by severe pain. [pp. 87-89]. We have already referred in Point I to Appellee's headaches, the drainage of his ear and the nervous condition of Appellee evidenced by his tears in Court. As pointed out by the Trial Court, at the time of the denial of Appellant's Motion for a New Trial, can it be said that there is any doubt that Appellee suffered physical pain to a considerable degree, in fact, excruciating pain in a region of the body where pain is known to be acute? The relative shortness of the period during which medical care was necessary and the fact that lost time from work was at a minimum do not of themselves determine the sole bases of and for the jury's appraisal of pain and suffering. Appellant pointed out that Appellee was a *foreman of a die shop* [p. 59]. Not only does this fact explain why there was so little lost time from work, but it also demonstrates the acute nature of the pain and suffering, that is, pain sufficient to cause tears in the eyes of Appellee (a man used to hard and rough work) at the thought thereof even after several months had elapsed since the date of the injury. The mere fact that after November 9, 1945, Appellee showed few objective signs of injury, does not support the conclusion that the verdict of the jury was "excessive." "Medical

science and human experience teach us that the extent of personal injuries cannot be measured solely by objective signs" and that an injury to the nervous system "may result in far greater and more lasting pain and disability than do many types of injuries which are plainly visible." (*Coleman v. Galvin*, 66 Cal. App. (2d) 303, 305.)

C. Substantial Limitations Are Placed by the Appellate Courts in California Upon the Power of Said Courts to Reverse a Verdict of the Trial Court Jury, Particularly Where the Trial Court Has Thereafter Denied a Motion for a New Trial.

In order to justify the Appellate Court in reversing an order denying a new trial or in reducing the verdict there must be a showing that the verdict is so disproportionate to *any* reasonable view of the evidence as to raise a strong presumption that it is based on prejudice or passion. (*Koyer v. McComber*, 12 Cal. (2d) 175, 182; *Loper v. Morrison*, 23 Cal. (2d) 600, 610.)

The Appellate Court may not set aside an award of damages as excessive merely because the opinion of the Court is at variance with that of the jurors. (*Williams v. Layne*, 53 Cal. App. (2d) 81, 86; *Stanhope v. L. A. College of Chiropractic*, 54 Cal. App. (2d) 141, 148.) The trial judge here appraised the damages on the Motion for a New Trial after the verdict of the jury and the Appellate Court should not disturb the verdict where the amount is not so "flagrantly outrageous and extravagant as to immediately suggest that it is the product of passion, prejudice or corruption rather than the fair judgment of an informed and reasonable being." (*Flanton v. Greenfield*, 56 Cal. App. (2d) 253, 254.)

D. The Error, If Any, Herein Was Not So Prejudicial as to Require, Under the Provisions of Article VI, Section 4½ of the California Constitution, a Reversal of the Judgment, nor the Reduction of the Verdict.

Since the Trial Court gave its modifying instruction emphasizing the impropriety of awarding "speculative damages" for future detriment and, since it cannot be reasonably said that the amount of the verdict is "excessive" under all the facts of the case, no reversible error (if any error there be, which we strongly deny) has occurred and the verdict, and judgment thereon, should be affirmed under the provisions of Article VI, Section 4½ of the California Constitution. (*Hughes v. Duncan,* 114 Cal. App. 576, 578; *Candini v. Hiatt,* 9 Cal. App. (2d) 679, 685, 686.)

Conclusion.

Having clearly demonstrated that the verdict of the Trial Jury was not excessive under all the facts of the case and that the Trial Court did not err in the giving of its instructions, we respectfully submit that the verdict of said Trial Jury, the judgment thereon, and the ruling of the Trial Court, denying Appellant's Motion for a New Trial, and each and all of them, should be affirmed and upheld by your Honorable Court.

Respectfully submitted,

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